Filed 6/27/19 In re Vaught CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re ELBERT LEE VAUGHT on Habeas Corpus.	G054657 (Super. Ct. No. M-16906) O P I N I O N

Original proceedings; petition for a writ of habeas corpus. Cheri T. Pham, Judge. Order to show cause discharged; petition denied.

Elbert Lee Vaught, in pro. per.; Sharon Petrosino, Public Defender, David Dworakowski, Assistant Public Defender, Brian Reznick, Deputy Public Defender, for Petitioner.

Michael S. Romano and Susan L. Champion, Three Strikes Project, Stanford Law School, as Amicus Curiae on behalf of Petitioner.

Xavier Becerra, Attorney General, Phillip J. Lindsay, Assistant Attorney General, Amanda J. Murray and Rachael A. Campbell, Deputy Attorneys General, for Respondent.

I.

FACTS AND PROCEDURAL HISTORY

A jury convicted petitioner Elbert Lee Vaught of one count of residential burglary (Pen. Code, §§ 459, 460, subd. (a), 461.1 (all statutory references are to the Penal Code, unless otherwise designated)), and one count of receiving stolen property (§ 496, subd. (a)). He admitted he had suffered six prior strike convictions (§ 667, subds. (d) & (e)(2)), and one prior serious felony conviction (§ 667, subd. (a)(1)).

Under the Three Strikes law, the trial court imposed an indeterminate sentence of 25 years to life for the burglary, plus a five-year enhancement for the serious felony prior. We affirmed the judgment on direct appeal. (*People v. Elbert Lee Vaught* (June 17, 1998, G020743) [nonpub. opn.].) Vaught is currently serving his sentence as "an indeterminately sentenced nonviolent offender."

Vaught filed a habeas corpus petition in the superior court challenging the California Department of Corrections and Rehabilitation (CDCR) regulations that at the time made three-strike offenders serving an indeterminate sentence for a nonviolent offense ineligible for early parole consideration under Proposition 57, the Public Safety and Rehabilitation Act of 2016.[1] The superior court denied the petition on the grounds it failed to state a prima facie case.

Vaught then filed a similar habeas corpus petition in this court. We asked for an informal response from CDCR, the Attorney General responded, and Vaught filed a reply. We issued an order to show cause why the relief requested in the petition should not be granted. The Attorney General filed a return and Vaught, now represented by

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[1] Proposition 57, approved by California voters in 2016, added a provision to California's Constitution that reads: "Any person convicted of a nonviolent felony offense and sentenced to state prison shall be eligible for parole consideration after completing the full term for his or her primary offense." (Cal. Const., art. I, § 32, subd. (a)(1) (hereafter section 32(a)(1)).)

counsel, filed a supplemental petition and a traverse. Thereafter, we received additional briefing from the parties and amicus curiae.

Following oral argument, the matter was submitted. While under submission, Vaught's attorney informed us CDCR had adopted new regulations governing Proposition 57. We vacated submission and since that time we have requested copies of CDCR's new regulations as they were promulgated, and have ordered supplemental briefing to address these regulations and subsequent case law authority. We now discharge our order to show cause, and deny the petition as moot.

II.

DISCUSSION

While proceedings in this matter were pending, our colleagues in the Second District issued *In re Edwards* (2018) 26 Cal.App.5th 1181 (*Edwards*). There the court held that the key provision of the CDCR's regulation that had made inmates like Vaught ineligible for early parole consideration under section 32(a)(1) — California Code of Regulations, title 15, section 3491, subdivision (b)(1) — was inconsistent with the constitutional provision and therefore void. (*Edwards, supra*, 26 Cal.App.5th at p. 1192-1193; cf. *Henning v. Division of Occupational Saf. & Health* (1990) 219 Cal.App.3d 747, 757-758 [administrative agencies have no discretion to promulgate a regulation inconsistent with the governing statute].)

In response to *Edwards*, "[t]he CDCR then adopted emergency regulations, effective January 1, 2019, to comply with [*Edwards*]. [Citation.]" (*In re Gadlin* (2019) 31 Cal.App.5th 784, 787 (*Gadlin*), review granted May 15, 2019, S254599.) The new regulations now provide that "[a]n 'indeterminately sentenced nonviolent offender' . . . *shall be eligible* for a parole consideration hearing by the Board of Parole Hearings." (Cal. Code Regs., tit. 15, § 3496, subd. (a), italics added.) As "an indeterminately sentenced nonviolent offender" under the amended regulations, Vaught is therefore now eligible for early parole consideration.

As a result, CDCR records now show Vaught's "Parole Eligible Date" as January 2019. "The parole eligible date . . . is the first date the inmate is (or was) eligible for a parole suitability hearing by the Board of Parole Hearings to determine if the inmate should be released. [Vaught] is eligible for a parole suitability hearing as an indeterminately-sentenced nonviolent offender under Proposition 57."[2]

The parties provided us with supplemental briefing on how *Edwards, Gadlin,* and CDCR's new regulations affected the instant petition. The parties agree Vaught is now eligible for early parole consideration under Proposition 57, but disagree on whether the current petition is now moot.

The legal issue presented in this case is identical in all material respects to the issue presented in *Edwards* save one: Here CDCR now has determined Vaught is eligible for early parole consideration, and has modified his parole eligibility date to January 2019. Furthermore, in a declaration attached as exhibit number 28 to the Attorney General's March 14, 2019, letter brief, Jennifer P. Shaffer, the Executive Officer of the California Board of Parole Hearings, declares that Vaught "has passed the Board's jurisdictional screening and has been placed into the Board's computer system queue to receive a parole hearing. Under the regulations, he will be scheduled for a hearing no later than December 31, 2020."

Vaught contends that even though he is now eligible for early parole consideration, the matter is not moot because the new regulations do not comply with *Edwards* by giving him the right to "a parole hearing within 60 days" of the issuance of a remittitur. This mischaracterizes the holding in *Edwards*.

Vaught conflates parole *eligibility* with parole *suitability*. Nothing in section 32(a)(1) dictates the timing of the actual parole suitability hearing. *Edwards* and

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[2] See https://inmatelocator.cdcr.ca.gov/Details.aspx?ID=H56089. On our own motion, we take judicial notice of the relevant CDCR records and regulations. (Evid. Code, §§ 452, subds. (c) & (d), 459, subd. (a).)

Gadlin — and the relevant new regulations — involve parole eligibility dates, not "parole hearing" dates, suitability determinations, or release dates. Thus, in *Edwards* the court ordered only that "Edwards shall be *evaluated* for early parole *consideration*," not that he shall be given a parole hearing date. (*Edwards, supra,* 26 Cal.App.5th at p. 1193, italics added; see also *Gadlin, supra,* 31 Cal.App.5th at p. 790 [CDCR "is directed to *consider* Gadlin for early parole *consideration*" within 60 days, italics added]; cf. *In re McGhee* (2019) 34 Cal.App.5th 902, 909 [distinguishing parole eligibility determinations made by CDCR from parole suitability decisions that must instead be made by the Board of Parole Hearings].)

Moreover, our order to show cause in this matter was predicated on whether Vaught was eligible for early parole consideration under Proposition 57, not when his actual parole hearing would occur. Indeed, throughout his pleadings, Vaught has consistently stated he was seeking "parole consideration," not a date-certain parole suitability hearing. Indeed, he acknowledged "Proposition 57 merely gives certain inmates parole consideration. An inmate entitled to parole consideration means only that they are entitled to a parole hearing, not that they are entitled to release."

The regulations at issue in our order to show cause were found invalid in *Edwards*, and have been replaced with regulations that make Vaught eligible for early parole consideration.[3] Moreover, CDCR records show Vaught is not just eligible for parole review, but that he "has passed the Board's jurisdictional screening and has been placed into the Board's computer system queue to receive a parole hearing."

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[3] The timing for parole consideration hearings are covered under separate regulations. (See Cal. Code Regs, tit. 15, § 2449.32; generally, see also §§ 2449.30, et seq. ["Article 16. Parole Consideration for Indeterminately-Sentenced Nonviolent Offenders"].) These temporal regulations were not at issue in *Edwards* or *Gadlin*, were not raised in Vaught's petitions or traverse, and were not encompassed by our order to show cause. They are therefore not before us.

Timing of Vaught's actual parole suitability hearing date was neither raised nor argued in his petitions or traverse, and was raised instead for the first time in supplemental briefing, it is not well-taken. (*Board of Prison Terms v. Superior Court* (2005) 130 Cal.App.4th 1212, 1235-1236 (*Ngo*).) A habeas corpus proceeding is "limited to the claims which the court initially determined stated a prima facie case for relief." (*In re Clark* (1993) 5 Cal.4th 750, 781, fn. 16, superseded by statute on other grounds as stated in *Briggs v. Brown* (2017) 3 Cal.5th 808; *In re Lawley* (2008) 42 Cal.4th 1231, 1248 (*Lawley*) [the claims in an order to show cause are limited to those alleged in the petition].) "'This process of defining the issues is important because issues not raised in the pleadings need not be addressed. [Citation.]' [Citation.] Under this process, the issues to be addressed may not extend beyond the claims alleged in the habeas corpus petition." (*Ngo, supra,* 130 Cal.App.4th at p. 1235.) Thus, what Vaught could not do in his traverse, "he cannot do at this even later stage: he cannot through argument in a [post-OSC] brief expand his claims beyond those alleged in the petition and made the basis of this court's order to show cause." (*Lawley, supra,* 42 Cal.4th at p. 1248.)

This court is bound to '"decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.' [Citations.]" (*In re Miranda* (2011) 191 Cal.App.4th 757, 762.) Consequently, "'[a] case becomes moot when a court ruling can have no practical impact or cannot provide the parties with effective relief.' [Citation.]" (*In re Stephon L.* (2010) 181 Cal.App.4th 1227, 1231.) Here, Vaught has already received everything he requested in his petition and everything that CDCR was ordered to do in *Edwards*. There are no justiciable issues left for us to decide.

III.

DISPOSITION

The order to show cause is discharged, and the petition for writ of habeas corpus is denied as moot.

ARONSON, ACTING P. J.

WE CONCUR:

FYBEL, J.

THOMPSON, J.